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IN THE

Supreme Court of the United States

October Term, 1958

No. 828

R. LAWRENCE SIEGEL

—and—

HADASSAH R. SHAPIRO,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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I.

Those who would condone these convictions find themselves unable to unite on a justification.

In the Court of Appeals the Government sought affirmance by misrepresenting its evidence. The Assistant U. S. Attorney who had tried the case made a vain effort to convince the Court of Appeals that the evidence showed that Miss Swanson, Colonel Bredin, and Mr. Shore possessed material information (withheld through deleting their names from memos), because they had *overheard the Matusow-Siegel conversations* about which Mr. Siegel testified before the grand jury on March 3, 1955.

The Court of Appeals could not accept this misstatement of the record (which the Solicitor General halfheartedly picks up at pp. 8 to 9), but produced its surprising anomaly in the law of perjury—that the immateriality of anything known by those whose names were deleted made no difference; deleting their names and swearing otherwise constituted material perjury because it is *conceivable* that under different circumstances the persons named might have knowledge of something—although in this case they had none.

Now comes the Solicitor General with a third view: anything which corroborates or contradicts the testimony of a grand jury witness is *ipso facto* material (pp. 16-17).

We respectfully remind the Court that petitioners faced none of these three contentions at their trial. (a) They had no opportunity at their trial to meet the Government's contention in the Court of Appeals because it was not made at the trial, where Miss Swanson, Colonel Bredin, and Mr. Shore as witnesses demonstrated their ignorance of anything material to the grand jury inquiry. (b) The rationale of the Court of Appeals was not, as the Solicitor General suggests at page 17, that a false grand jury statement may be material if it tends to impede the course of the investigation; it was, in the language of the opinion: "A question is 'material,' no matter what the answer may be, unless it appears by its terms that the answer cannot be 'material.'" (App. A, p. 6.) No advocate in this case and no court in any other case had ever before given the perjury statute such a construction.*

(c) The Government did not suggest to the Court of Appeals that anything corroborating or impeaching a grand

* Such a test of materiality requires the defendant to prove immateriality, subtly and unconstitutionally shifting the burden of proof. Cf. *Speiser* v. *Randall*, 357 U. S. 513 at 528.

jury witness is always material. Nor did the Court of Appeals, discarding the Government's arguments and finding a rationale of its own, give any consideration in its opinion to this contention.

Speaking of the memoranda which were Mr. Siegel's aide memoire, the Solicitor General now says (p. 17):

> "The originals would have been useful either to corroborate or to impeach Mr. Siegel's oral testimony about his contacts with Mr. Matusow."

All the evidence in the record shows that the originals would *not* have been useful either to corroborate or to impeach Mr. Siegel's oral testimony about his contacts with Mr. Matusow. Thus the ultimate question which would be before this Court upon the grant of certiorari would be whether to reverse these convictions on the evidence or affirm them on conjecture; for actually the hypothesis of the Court of Appeals that the memoranda "might have led to relevant disclosures" did not exist in real life or in the record of this case, as the Court of Appeals conceded in its own very next sentence. Taking the Court's observation in context it was (App. A, p. 5):

> "'Conceivably the omitted passages, if followed up, by cross-examination, might have led to relevant disclosures. However, we do not rest our affirmance of the convictions upon that possibility; on the contrary we will assume, *arguendo*, that the disclosure of the omitted passages would have contributed nothing to what the grand jury was seeking."

The evidence clearly shows that nothing in the original memoranda varied in substance from Mr. Siegel's testimony concerning the subject of the grand jury investiga-

tion, Matusow's recantation. Miss Shapiro, of course, did not testify at all on that subject. The memoranda being incapable of adding or subtracting credence to petitioners' testimony on the matter which was within the scope of the grand jury inquiry, false statements about the time or manner of preparing the memoranda were also incapable of affecting credibility on the issues before the tribunal.

Mr. Siegel's testimony about his meetings with Matusow was not based upon the memoranda. He testified before the grand jury from his independent recollection. Hence his private aide memoire themselves would not be admissible in evidence as corroboration. Having testified from a present memory and without using aide memoire, any false statements about aide memoire could also have no effect to bolster the testimony.

Siegel did *not* testify, "I have memoranda which *bear out* what I have said." At the beginning of his first grand jury appearance Mr. Siegel said:

> "I made notes from time to time of the things that we [Matusow and Siegel] talked about. I worked last night until about 11 o'clock; I think if you could give me another half day I could reconstruct from—I have a downtown and an uptown office—I could reconstruct from whatever notes we have, a picture of the things we talked about that I think would give you a complete picture. * * * " (Ex. 2, p. 722.)

Towards the end of that appearance, he testified:

> "Q. Do you say that if given more time you would be able to more fully reconstruct your contacts with Matusow—is that correct? A. Let me see: He wrote a poem to me, which he left at my office, which I should be able to find. Also, what I can do is this: I am pretty

sure that if we go through the girls' stenographic books, and all of my personal files, and perhaps THE NATION files, and my miscellaneous material, I should be able to do the following for you: To pinpoint precisely the days that I saw him, and to give you, I think, a reliable and correct chronological story of what the things were that we talked about when we met.

"Q. I don't think it is necessary that you come before the Grand Jury again for that purpose. If you will deliver that material to me, I think it would be all right, unless the Grand Jury would like to have it.

"A Juror: Did you keep notes of your conversations with Matusow?

"The Witness: I am in the habit of dictating memoranda on practically everything I do, qualified by this reservation: Sometimes you don't have the time in an office, particularly when you are engaged in litigation, to make all of the notes you want to make; but I am pretty sure I will have a creditable and complete picture to present.

"A Juror: Wouldn't that be subject to the reservation that if anything arises from your examination that is strongly at variance with anything that your recollection has caused you to say to us, that that might be brought before us?

"Mr. Bolan: Yes, subject to that reservation." (Ex. 2, pp. 747-748.)

The grand juror's request that Siegel examine his aide memoire was expressed in terms neither of possible impeachment nor of corroboration; but only in terms of the possibility that looking at the memoranda might refresh his recollection as to some material item omitted from his testimony, about which he would *return to the grand jury to give additional testimony*. There is not a shred of evi-

dence that the memoranda before revision contained anything of the sort.

No question has ever been raised as to the veracity of Siegel's testimony on March 3, 1955—when he fully described what Matusow had said to him during any of the conversations about Matusow as a Government witness.

Siegel was not indicted for misrepresenting the content of his talks with Matusow. No statement about Matusow by either petitioner was ever alleged to be false.

In these circumstances it could not bolster Siegel's testimony about Matusow (which, not being challenged, required no corroboration) to delete the names of and references to Miss Swanson, Colonel Bredin, and Mr. Shore from the aide memoire. Had they been produced without revision the aide memoire and the existing stenographic notes would not have contradicted anything Siegel had reported as to what he and Matusow had said to each other. As Judge McGOHEY said at the time of sentencing,

> "• • • • there was nothing in this record to justify an inference by this Court • • • that either of these defendants was motivated or had contributed in any way to any conspiracy of which Matusow may have been a member • • •.
>
> "• • • • the testimony of the defendants with respect to what was in their minds when they did this has not been counteracted by any evidence offered by the Government, and furthermore, in so far as the record discloses there were no other persons at any time at any of these meetings other than the Colonel Bredin and Miss Swanson and Shore—" (App. E, p. 32).

Protecting famous clients from newspaper notoriety may or may not be a lawyer's duty; petitioners thought that

it was. If they were mistaken or carried their view too far, the situation nevertheless fails to fit into the rule of *Slutzky, Hendrickson, Carroll, Hirsch, Dolan* and *La-Salle* cited by the Solicitor General. We submit that the Solicitor General has made a pallid last-minute effort to rescue these shaky convictions with the argument that the deceptions were committed to support Siegel's credibility.

The "credibility" theory of materiality was advanced in *United States* v. *Icardi*, 140 F. Supp. 383 (D. C. D. C. 1956). The Court, dismissing the indictment, said in answer to the Solicitor General's present view:

> "The court has not overlooked the Government's argument that the matters sought to be elicited by these six questions were material because, if Icardi had impressed the subcommittee with his credibility and had produced substantial corroborative evidence, the subcommittee might have concluded that he was innocent. In the face of the evidence that, as of the time he was questioned, Icardi's answers could have no effect upon the subcommittee's conclusions in the field of legitimate congressional investigation, this slim conjecture cannot support a finding by this court, as a matter of law, that Icardi's answers related to a material matter. Whether Icardi denied or confessed guilt by his answers, his testimony could not have influenced the subcommittee's conclusion on subjects which might be legitimately under investigation. . . ." 140 F. Supp. at 389.

Here, too, the memoranda and the answers about them could, at the time of questioning, have no effect on findings or conclusions in the grand jury's investigation of Matusow.

II.

The latest case on the subject, *People* v. *Matula*, 168 A. C. A. 899, 336 P. 2d 1000 (Cal. Ct. App. Mar. 19, 1959), strongly supports petitioners' contention that the District Court erred in not receiving all the relevant proof about materiality and in not submitting this issue of fact to the jury. In its decision, the California District Court of Appeal reversed a perjury conviction and granted a new trial on the ground that the trial judge's instruction to the jury that as a matter of law defendant's testimony was material, when the materiality of the testimony depended upon the existence of certain other disputed facts, deprived him of his right to trial by jury.

The trial judge in the *Matula* case made his ruling after the close of the prosecution's case, thus precluding further proof or argument on the issue of materiality. In its reversal, the Court of Appeal stated:

> "Conceding that materiality is a question for the court, we nevertheless believe that the trial judge, in making his determination thereof, is not at liberty to resort to something undisclosed outside of the record *or dispense with the necessity for competent evidence to support his finding;* but that he must submit to the jury the facts upon which he predicates his finding." 168 A. C. A. at 908, 336 P. 2d at 1009. (Emphasis added.)

Rejecting the contention that the trial judge could properly take judicial notice of facts rendering defendant's testimony material, the Court of Appeal concluded that:

> "The record does not disclose what he [the trial judge] had in mind when he made his finding of materiality.

how or in what manner he arrived at his conclusion, or the source of his information; nor does it reveal that defendant was apprised of the source or the circumstantial or probative facts under his consideration, *or that defendant was given an opportunity to meet, rebut or argue them.*" 168 A. C. A. at 911, 336 P. 2d at 1011. (Emphasis added.)

Respectfully submitted,

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Dated: New York, N. Y.
22 May 1959.